85-731

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES L. MAXFIELD

v.

SINCLAIR INTERNATIONAL and DAVID H. SINCLAIR,
President of Sinclair International,
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in an Age Discrimination in Employment Act case, the District Court improperly prohibited the jury from considering social security benefits received by the Plaintiff after his employment termination as a set-off against any damages to which he may have been entitled, particularly where the employer's violation was found to be not willful.

2. Whether the District Court improperly permitted the Plaintiff to present evidence and to secure recovery for front pay damages beyond the trial date where the Plaintiff never properly requested reinstatement.

3. Whether the District Court improperly permitted the Plaintiff to present evidence regarding his alleged front pay loss in the absence of proper foundation through expert testimony.

4. Whether the Plaintiff established a prima facie case under the Age Discrimination in Employment Act where he was replaced by someone who also was in the protected age group.

PARTIES

All parties to the proceeding in the United States Court of Appeals for the Third Circuit are noted in the caption of this Petition. Sinclair International has no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

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THE OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 766 F.2d 788, and appears in the Appendix at A1. The Order of that Court denying rehearing appears in the Appendix at A31. The Memorandum Opinion and Order of the District Court for the Eastern District of Pennsylvania is unreported, and appears in the Appendix at A19.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1985. A timely Petition for Rehearing was denied on July 29, 1985. This is an action which was instituted pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, *et seq*. There is Federal jurisdiction pursuant to 29 U.S.C. §626 and 28 U.S.C. §1331. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §631. Age limits.

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

This case was instituted by Respondent, James L. Maxfield (hereinafter "Maxfield"), under the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq*. It was tried before a jury in February of 1984 in the Federal Court for the Eastern District of Pennsylvania, the Honorable Raymond T. Broderick presiding. Federal jurisdiction was proper in the Court of the first instance pursuant to 29 U.S.C. §626 and 28 U.S.C. §1331. The trial resulted in a verdict in favor of Maxfield and against Petitioners, Sinclair International and David H. Sinclair, President of Sinclair International (hereinafter collectively "Sinclair"), in the amount of $33,398.00 for past damages and $7,500.00 for future damages.

Maxfield commenced the action in May of 1982 by filing a Complaint alleging essentially that he had been an employee of Sinclair from 1940 until 1980 and that on December 31, 1980, he was forced to retire due to his age, which at that time was approximately 65½ years. The Complaint requested various damages although it

did not contain any request for reinstatement to Maxfield's former employment position.

Sinclair denied the Complaint allegations, contending that Maxfield's dismissal was due to his poor job performance and asserting that he had in fact been retained during the last years of his employment solely to insure full vesting at age 65 of his pension benefits under the Sinclair retirement plan. Additionally, as confirmed by Maxfield's own testimony at trial (trial transcript, 6.92), Sinclair contended that Maxfield would not have received the Social Security benefits paid to him after his employment termination had he remained in the employ of Sinclair. Accordingly, Sinclair contended that any damages awarded to Maxfield should be subject to a reduction or set-off equal to the Social Security benefits in question. Maxfield acknowledged at trial that the Social Security benefits he had been receiving since his employment termination amounted to approximately $14,000 per year (trial transcript, 6.94), all of which were tax free. Finally, Maxfield confirmed that his wife, a government employee, was entitled to no Social Security benefits whatsoever (trial transcript, 6.92, 6.93), as a result of which the Social Security benefit receipts of Maxfield were due solely to the termination of his employment with Sinclair.

Maxfield also requested and was permitted by the District Court to testify at trial regarding front pay, or that income he estimated he would have earned had he remained in the employ of Sinclair from trial until age 70. No expert testimony whatsoever was presented by Maxfield on the area of front pay. Further, Maxfield at no time requested reinstatement to his former position. In spite of these facts, the jury was permitted to award Maxfield damages for front pay.

Finally, it was uncontested that Robert Dunlap, the Sinclair employee promoted to fill Maxfield's position, was within the protected age class, being 42 years of age at the time he assumed these duties.

At the conclusion of trial the jury rendered a verdict in favor of Maxfield for the damages stated hereinbefore. Sinclair filed Motions for Judgment Notwithstanding the Verdict and/or for New Trial. On August 8, 1984, Judge Broderick filed a Memorandum Opinion and Order denying Sinclair's Motions. On July 3, 1985, the Court of Appeals for the Third Circuit affirmed the District Court's decisions. A Petition for Rehearing was denied by the Third Circuit *en banc* on July 29, 1985. The July 3, 1985, judgment of the Court of Appeals, affirming the District Court decisions, is the subject of this Petition.

REASONS FOR GRANTING THE WRIT

1. **The holding by the Third Circuit that Social Security benefits received by Maxfield after his termination were not to be set-off against any damages to which he may have been entitled is in error and is inconsistent with analogous decisions by other Federal Courts of Appeals.**

Maxfield acknowledged at trial that, after his termination of employment with Sinclair, he began collecting Social Security benefits which he would not have been entitled to receive had he remained so employed. He also acknowledged that these Social Security benefits totalled approximately $14,000 per year and were all received tax free. Additionally, because Maxfield's wife was a government employee not entitled to Social Security benefits, it is undisputed that his Social Security benefits were paid solely as a result of the termination of his employment.

It is also uncontested that the jury found that Sinclair's violation of the A.D.E.A. was *not* willful (trial transcript, 5.8).

Sinclair believes that these two factors are extremely important. The receipt by Maxfield of approximately $14,000 per year since his employment termination,

coupled with the income he received from part-time employment during those years and other sources, have enabled him to realize *more* net income since his employment termination than he had ever earned while employed. As an example, it was shown at trial that in 1980, Maxfield's last year of employment, he earned $24,000. He paid approximately $5,000 of income taxes, resulting in net income to him that year of $19,000 (trial transcript, 6.93, 6.94). By contrast, in 1981 he earned and received $30,272.19, $14,000 of which was Social Security benefits (trial transcript, 6.96). His 1981 net income was substantially larger than it had been in 1980 or any year during his employment with Sinclair.

In 1982 Maxfield earned $9,955 in taxable income and received approximately $14,000 of Social Security benefits. Of this $23,955.00 total only $5,900 was subject to taxes, again resulting in net receipts by him in excess of those during his best year of employment (trial transcript, 6.96, 6.97). Finally, during 1983 Maxfield's total receipts were $22,211, $14,000 of which was Social Security benefits and the balance of which was income from part-time employment. Of this total, only $1,666 was subject to income tax, again resulting in net receipts which exceeded those of any year in which Maxfield had been employed (trial transcript, 6.95, 6.96).

As is obvious from the foregoing, Maxfield has, in fact, benefited financially as a result of his employment termination. Under these circumstances, particularly including the non-willful nature of Sinclair's violation, the failure of the District Court to allow the jury to consider the $14,000 tax-free Social Security receipts as a reduction of Maxfield's damages resulted in an unjustified windfall to him and an unjustified penalty to Sinclair. This failure also caused a double recovery for Maxfield. He received tax-free Social Security benefits to which he would not otherwise have been entitled and he also received an equal amount from Sinclair as part of his damage recovery. At best this is an abuse of discretion under

the circumstances of this case. At worst, it is a violation of the applicable law.

The Third Circuit, in affirming the decision of the District Court, relied primarily on *Craig vs. Y & Y Snacks, Inc.*, 721 F.2d 77 (3rd Cir. 1983), in which it was held that unemployment compensation should not be deducted from a Title VII back pay award. The Court also applied *Craig* in *McDowell vs. Avtex Fibers, Inc.*, 740 F.2d 214 (3rd Cir. 1984), *vacated and remanded on other grounds*, 105 S.Ct. 1159 (1985), an A.D.E.A. action holding that unemployment benefits could not be off set.

The problem with *Craig* is that it attempts to apply a Title VII claim to an A.D.E.A. action. Under Title VII, an employer's conduct must be intentional for it to be liable. Such is not the case under the Age Discrimination in Employment Act and was not the finding of the jury here. Accordingly, any analogy to the *Craig* decision is misplaced. Given these differences and the overall economic considerations, the District Court's failure to permit set-offs for Maxfield's Social Security receipts caused an unjust recovery.

It must also be noted that the Third Circuit's reliance on its prior *McDowell* decision is misplaced because in that case a willful violation of the A.D.E.A. was found.

Finally, the *Craig* holding is inconsistent with the approach taken by other Federal Courts of Appeal compensating victims of discrimination.

For instance, *Wilson vs. Wehadkee Yarn Mills*, 32 E.P.D. ¶33,776 (M.D.Ala. 1983), permitted a set-off for unemployment benefits received by a plaintiff in an age discrimination case. It distinguished the A.D.E.A. from National Labor Relations Act and Title VII situations. In doing so, the Court noted that the Ninth Circuit Court of Appeals, pursuant to the terms of the A.D.E.A., had allowed a set off of unemployment compensation benefits in *Naton vs. Bank of California*, 649 F.2d 691 (9th Cir.

1981). The Court explained the Ninth Circuit Court of Appeals' decision by noting that:

> (t)he Age Discrimination in Employment Act . . . is not based upon the N.L.R.A. as is Title VII . . . Therefore, this court is of the opinion, as stated earlier and under the explicit language of the A.D.E.A., that it has the discretion to deduct unemployment compensation benefits from an award of back pay.
>
> *It is the Court's opinion that a refusal by this Court to allow the deduction of unemployment compensation from the back pay award is to make the Plaintiff more than whole.* Additionally, this Court is bound by the precedent established in *Merriweather*, supra, and *Brown*, supra, which is to allow the deduction of unemployment compensation benefits from an award of back pay. (Emphasis added).

As for the authority cited in the *Wilson* case, see *Brown vs. A. J. Gerrard Manufacturing Company*, 695 F.2d 1290 (11th Cir. 1983) and *Merriweather vs. Herculese, Inc.*, 631 F.2d 1161 (5th Cir. 1980).

The Third Circuit ruling that Social Security benefits cannot be considered as a set-off is in direct contradiction to the holding of the Second Circuit in *Whittlesey vs. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984). In *Whittlesey* the Second Circuit affirmed the decision of the District Court judge deducting unemployment compensation and pension plan benefits from the various damages which the former employee had been awarded. As in the case at bar, the finder of fact in *Whittlesey* found that the employer had not committed a willful violation of A.D.E.A.

The foregoing establishes the existence of a conflict among the Federal Circuit Courts as to whether or not such set-offs should be permitted, and particularly where the violation is not willful.

There are obviously differences between Title VII cases (where an employer's conduct must be intentional) and the present A.D.E.A. case (in which Sinclair did not act willfully). In fact, the various Federal Courts of Appeals are split as to whether or not unemployment benefits are to be set off in Title VII cases.

Given the above, Sinclair submits that the District Court improperly prohibited the jury from setting off Social Security benefits from damages it awarded to Maxfield. This prohibition permitted an unfair result, especially where Sinclair's actions were found not to be willful. In effect, Maxfield was permitted to be made more than whole. Such a decision is in direct conflict with the holdings of other Federal Circuit Courts, as noted above.

2. The Court of Appeals erred in permitting Maxfield to present evidence and to secure recovery for front pay damages beyond the trial date, especially since Maxfield never properly requested reinstatement. Further, the decision to allow front pay, even assuming reinstatement was requested, is in conflict with the decisions of other Federal Courts.

After initially agreeing with Sinclair's position regarding the inability of Maxfield to seek or recover front pay and damages beyond the trial date, the District Court reversed itself, permitting such evidence. This reversal and permission violates the Act and the case law thereunder.

It must be first kept in mind that no where in his Complaint did Maxfield request reinstatement to his former position. The Complaint sought only damages and attorneys fees. It must also be kept in mind that at

no time during the trial did Maxfield request reinstatement to his former job. Accordingly, the pleadings and record of this case contain absolutely no request for reinstatement. As such, any claim for front pay or damages beyond the trial were inadmissible and should not have been permitted.

The Third Circuit ignored its prior decision in the case of *Wehr vs. Boroughs Corporation*, 619 F2.d 276 (3rd Cir. 1980), which is directly on point. On page 283 of that Opinion the Third Circuit stated that a plaintiff removes the issue of front pay from consideration under the A.D.E.A. where he does not seek reinstatement:

> We will not decide whether future damages may be awarded in A.D.E.A. cases, however, because we are persuaded that Wehr has removed this issue from consideration. Any basis for calculating front pay would include the amount Wehr would have received beyond the trial date. Of necessity, Wehr's argument that he is entitled to future damages in lieu of reinstatement presupposes that he wanted to be reinstated.

Sinclair submits that a court may not assume or imply any desire for reinstatement on the part of Maxfield where the pleadings and record are devoid of any such request or claim. Accordingly, as in the *Wehr* case, Maxfield himself removed the issue of front pay from any consideration and should not have been permitted to present evidence regarding it or to have received any recovery for damages beyond the trial date.

Other courts have followed this view when a discharged employee fails to request reinstatement or withdraws such a request. Under such circumstances the employee is held automatically to have waived his right for prospective damages. *See, Monroe vs. Penn-Dixie Cement Corporation*, 335 F.Supp. 231 (N.D.Ga. 1972); *Covey vs. Robert A. Johnston Company*, 19 F.E.P. 1188 (D.Md. 1977).

The reasoning in these cases, and other cited hereinafter, is clear. A party is not entitled to damages which he has not sought or requested. Obviously, where a discharged employee fails to seek reinstatement there is no basis for his recovery of lost income in the future from that job. That argument is particularly persuasive in the instant case where the record is clear that Maxfield received a combination of Social Security, retirement and other employment income and benefits after termination which *exceeded* the amount earned by him in any year while employed by Sinclair. Coupling these facts with his failure to request reinstatement leads to the inescapable conclusion that awarding front pay not only violates the case law but is contrary to Maxfield's own desires as pleaded and established by the evidence, none of which reveal any basis for a reinstatement request or future damages.

In its Memorandum Opinion, the District Court attempted to distinguish the *Wehr* case from the instant situation by noting that the Complaint filed herein sought "back pay for all wages lost as a result of his forced retirement, and for pay until age 70 for wages lost as a result of such involuntary termination." The Court noted that in his pre-trial Order, Maxfield asked for similar damages. Judge Broderick then notes that in the *Wehr* case the plaintiff had asked neither for future lost wages nor for reinstatement. Accordingly, he concluded that Maxfield had not waived his right to future lost earnings. Such reasoning is flawed. Given Maxfield's circumstances after his employment termination one cannot logically argue that he had any desire for reinstatement whatsoever. He currently is receiving more money in exchange for little or no work than he ever earned while employed. There can be no doubt that in reality any potential claim or request by him for reinstatement had been "removed . . . from consideration" by the facts and circumstances of this case. It was never specifically requested. A mere request for front pay damages cannot

serve as a substitute for a reinstatement request permitting the recovery of such damages.

Secondly, as many courts have held, the computation of future damages is highly speculative. In fact, in the *Monroe* case, it was held that these damages were speculative because the plaintiff was in his forties. In the instant case the jury was asked to speculate as to the income which Maxfield would have earned had he remained employed by Sinclair. As will be discussed later, this income was projected based solely on speculation and was reduced to present worth by arbitrary means without justifiable foundation or basis.

This holding by the Third Circuit that Maxfield is entitled to front pay, even assuming that reinstatement was requested, is in direct conflict with the holdings of other Federal courts.

For instance, the Federal Courts of Maryland have been adamant in prohibiting the recovery of front pay under the A.D.E.A. In *Foit vs. Suburban Bancorp.*, 549 F.Supp. 264 (D.Md. 1982), the Court held that the A.D.E.A. prohibits recovery for anticipated future earnings losses under any circumstances. Citing *Covey vs. Robert A. Johnston Company*, 19 F.E.P. 1188 (D.Md. 1977), the Court stated:

> . . . this Court flatly ruled that front pay is not available in an A.D.E.A. case. In so holding, Judge Young disregarded arguments that an exception should be made where the plaintiff also seeks reinstatement.

The *Foit* Court cited two additional decisions, all of which support and include clear reasoning on this issue: *Mader vs. Control Data Corporation*, 19 F.E.P. 1192 (D.Md. 1978), and *Jaffee vs. Plough Broadcasting Corporation*, 19 F.E.P. 1194 (D.Md. 1979).

A more recent Maryland case, *Helwig vs. Suburban Chevrolet, Inc.*, 32 E.P.D. ¶33, 327 (D.Md. 1983), views the remedies available to the plaintiff in an A.D.E.A. case

and accurately points out that no general provision is made thereunder for front pay:

> Finally, defendant had moved to dismiss plaintiff's demand for an award of expected future earnings under the A.D.E.A. As described, *supra, the monetary awards recoverable under the A.D.E.A. are explicitly stated, and no general damages provision makes available remedies such as "front pay."* (emphasis added).

As an additional basis for its finding, the *Helwig* Court states on page 31, 333 that:

> Federal courts which have faced the question of an award of front pay under the A.D.E.A. have repeatedly viewed such a measure as overly speculative and beyond the scope of the statute's remedial scheme.
>
> . . .
>
> Moreover, the A.D.E.A. has repeatedly been viewed by this Court as an inappropriate vehicle for the award of "front pay".

The Southern District of New York has also approved Sinclair's position in this case. In *Ginsberg vs. Burlington Industries, Inc.*, 500 F.Supp. 696 (S.D.N.Y. 1980), the Court stated that even if front pay were permissible it would be inappropriate in circumstances where reinstatement was not generally pursued. That ruling would apply clearly to the instant situation.

In *Ventura vs. Federal Life Insurance Company*, 571 F.Supp. 48 (N.D.Ill. 1983), the Court states in footnote 2:

> Where the plaintiff does not even seek reinstatement, he or she would appear to have no claim for future benefits.

Finally, the holding by the Third Circuit in the instant case is in direct conflict with the holding of the

First Circuit in *Kolb vs. Goldring, Inc.*, 649 F.2d 869 (1st Cir. 1982). The *Kolb* court, in footnote 4 and citing *Wehr*, states:

> Had Kolb's Goldring income been as high as he suggests . . . Kolb would still have not regained his former economic status by the date of judgment. The proper period would then have been from the date of termination to the date of judgment. *In such circumstances, of course, damages are "settled" on the date of judgment and the plaintiff cannot then recover damages for future economic loss, or "front pay", even though the injury continues.* See *Wehr vs. Boroughs*, 619 F.2d 276, 283 (3rd Cir. 1980) *(no future damages where the plaintiff did not seek reinstatement); Monroe vs. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D.Ga. 1971). (Emphasis added).

3. The Court of Appeals erred in permitting Maxfield to present evidence regarding his alleged front pay loss without proper foundation through expert testimony.

In order to present his case for lost front pay, Maxfield elected to forego the use of any economic expert. Instead, with the permission of the District Court and over objections of defense counsel, Maxfield himself estimated his future lost income based upon his performance in prior years and then arbitrarily chose to reduce the projected future income by a 10% factor in order to arrive at its present value or present worth. To allow such an action is clearly erroneous.

As pointed out in many of the cases cited hereinbefore regarding front pay, these damages by their nature are speculative at best. Accordingly, even if they are permitted, they must be based upon reasonable economic projections presented by competent, economic expert testimony. No such evidence or testimony was

presented. In spite of this, the District Court, after initially holding that this evidence was inadmissible, reversed itself and allowed the jury to hear this testimony. The fact that an award for future damages was made is clear evidence that this inadmissible testimony was considered by the jury.

It is so universally accepted that future economic claims require expert testimony that citations for this proposition are not necessary. All rules of evidence require such speculation at the very least to be based upon competent, expert testimony. Additionally, any such expert testimony would have required a factual foundation including an analysis of Maxfield's former customers, their current financial and economic position, analysis of the competition and changing market conditions, price increases or decreases by Sinclair and its competitors, evidence of the increase or decrease in the cost of goods and the industry price structures, as well as several other factors upon which any claim for future lost income must be based. None of this was presented. Instead, the jury was permitted to speculate as to the lost front pay based only upon Maxfield's former earnings history with an arbitrary 10% reduction to present worth. The fact that Maxfield's past performance cannot be utilized as a basis for his alleged future front pay can be clearly seen by the performance of his successor, Mr. Dunlap, whose sales figures far exceeded Maxfield's. Had prior history been utilized in projecting Mr. Dunlap's performance, the projections would have varied substantially from the actual results. Accordingly, by permitting the jury to base front pay damages on such speculation, the District Court erred. The requirements of proof of damages under the A.D.E.A. were discussed in *Kolb vs. Goldring*, 649 F.2d 869 (1st Cir. 1982). In that case the Court discussed the measure of proof required to establish what the plaintiff would have earned from the date of termination until the time of trial. While this does not relate to

future damages beyond the time of trial, which *Kolb* prohibits, it is illustrative on the question of the burden to which a plaintiff is put in establishing A.D.E.A. case damages. On pages 872 and 873 the Court states:

> Recovery for raises an employee might reasonably have anticipated (between discharge and trial) had he not been wrongfully discharged has been allowed in A.D.E.A. cases . . . *However, where awarded, either under the A.D.E.A. or in other context, the projection has been based on expert testimony, patterns of past increases, or similar evidence . . .*
>
> . . .
>
> Here Kolb did not in fact receive any raise before he was let go. No evidence was introduced showing a company policy or practice from which it could be inferred that someone in his position would have received an $8,000 raise. *Nor was other statistical or expert evidence introduced showing comparable salary increases in the industry.*
>
> . . .
>
> While . . . factors might well have led a rational jury to believe that Kolb would have been granted raises during the period in question had he not been fired, *we remain troubled by the lack of specific evidence from which the jury could have deduced the amount of such raises. The situation resembles that in contract cases involving claims for lost profits.*
>
> *There the evidence must establish the amount of lost profits with "a reasonable certainty" . . . This does not mean, however, that the jury is free to pull figures out of a hat. The plaintiff has the burden of placing evidence in the record affording reasonable support for the sums found. A jury may not render*

a verdict based on speculation or guess work. (Emphasis added).

In defense of their rulings permitting future speculation, the District Court and the Court of Appeals concluded with little or no substantiation that Maxfield's voluntary reduction of future lost earnings at a 10% per year rate was reasonable and actually beneficial to Sinclair. The only authority cited for this conclusion by the District Court in its Memorandum Opinion was an article in the *New York Times* from September 12, 1983. Aside from the fact that that article did not appear at or about the time of trial, when economic conditions differed, it does not constitute sufficient substantiation for any projections regarding future income. Such projections, as pointed out by the District Court, may be based upon various judicially approved accounting approaches relating to inflation and interest rates. The District Court even cited one of these, the "real interest rate".

Neither the District Court nor Maxfield identified or produced competent testimony or authority indicating what the "real interest rate" was as of the time of trial or the manner in which it should have been computed for the jury. Whether or not the computation for determining Maxfield's future income losses were complicated or were not (as indicated by the District Court and Court of Appeals in their Opinions), the fact remains that there was insufficient evidence to permit the jury to speculate on such future damages and the manner in which they were to be properly reduced to current worth.

It was Maxfield's burden to produce such evidence by competent testimony and experts in order to support an award for future damages, assuming they are permissible (which Sinclair denies). Maxfield must bear the consequences of his failure to meet that burden of proof.

4. The Court of Appeals erred in holding that Maxfield established a prima facie case under the Age Discrimination in Employment Act when it was shown that Maxfield was replaced by a person also within the protected age class.

Section 631 of the A.D.E.A., enacted as part of its 1980 amendments, states the following:

> **(a) Individuals at least 40 but less than 70 years of age**
>
> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

It is uncontested that Robert Dunlap, the employee of Sinclair who was promoted in order to fill Mr. Maxfield's position, was within the protected age class, being 42 years of age at the time he assumed these duties.

It is clear by the direct words of the Act that it was intended to protect persons between the ages of 40 and 70. No where in the Act, and no where in its legislative history, is there any indication that replacement of one person within the protected class by another also within that class is to be considered a violation of the Act's provisions.

To the contrary, it is evident that the Act was designed to prohibit replacement of persons within the age class by younger persons outside its parameters. The cases supporting this far outweigh any holding to the contrary and include, but are not limited to, *Harping vs. Continental Oil Company*, 628 F.2d 406 (5th Cir. 1980), cert. denied 454 U.S. 819; *Houser vs. Sears, Roebuck & Co.*, 627 F.2d 756 (5th Cir. 1980); *Mizrany vs. Texas Rehabilitation Commission*, 522 F.Supp. 611 (S.D.Tex. 1981), affirmed 685 F.2d 1384; *Johnson vs. Mayor and City Council of Baltimore*, 515 F.Supp. 1287 (E.D.Md. 1981); *Carolan vs. Central Freight Lines, Inc.*, 489 F.Supp. 941 (E.D.Tex. 1980); *Rhoades vs. Book Press*,

458 F.Supp. 674 (D.Vt. 1978); *Rodrigues vs. Taylor*, 569 F.2d 1231 (3d. Cir. 1977).

The *Rodrigues* decision stated, as did all of the other cited opinions, the following:

> To establish a prima facie case, the plaintiff must show that (1) he was within the protected age class, (2) that he was qualified for the position from which he was terminated and was performing his job at an adequate level, (3) that he was discharged, *and* (4) *that his employer retained some one to continue the plaintiff's work who was not in the protected group.* (Emphasis added).

The District Court and Court of Appeals, in citing cases upholding Maxfield's position, attempted to dismiss those cases cited by Sinclair on the basis that none of them hold that replacement by a younger employee will not fulfill the prima facie case requirements. It is through the use of this double negative reasoning that the lower courts rejected Sinclair's argument. This attempt disregards the clear wording of the Act, which provides equal protection to all individual employees between the ages of 40 and 70. No where does the Act give priority to one member of the protected class over any other. Accordingly, whether the replaced employee is younger or older than his replacement is irrelevant under the Act, as long as both are within the protected age category. It is only where replacement occurs by one outside that category that a violation of the Act occurs. Had Congress intended specifically to prohibit the replacement of an employee of any age by one who was younger, irrespective of the ages of each or the differences between their ages, it easily could have so indicated. That it did not do so and that the Act provides for equal status and protection for all employees between the ages of 40

and 70 is clear evidence that those cases requiring replacement by an employee outside the protected age category in order to establish a prima facie action contain the more accurate reasoning.

There is a clear split among the Courts of Appeals as to whether or not a prima facie case is established when an employee is replaced by one who is also within the protected age group. Further, for the reasons stated above, Sinclair submits that the approach taken and conclusions reached by the Third Circuit Court of Appeals are clearly erroneous, based upon the clear language of the Act.

CONCLUSION

Sinclair submits that the affirmation by the Third Circuit Court of Appeals of the District Court's rulings is clearly erroneous under the Age Discrimination in Employment Act, with each being in direct conflict with decisions reached by other Federal Courts of Appeals.

For these reasons, Sinclair respectfully prays this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-1518

JAMES L. MAXFIELD

v.

SINCLAIR INTERNATIONAL and DAVID H. SINCLAIR,
President of Sinclair International,

Appellants

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 82-1911)

Argued May 13, 1985

Before: HUNTER and SLOVITER, *Circuit Judges*,
and COHEN, *District Judge**

(Opinion filed July 3, 1985)

Benjamin E. Zuckerman (Argued)
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Attorney for Appellants

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* Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

Frank P. Murphy (Argued)
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Attorney for Appellee

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Plaintiff James L. Maxfield brought this action against Sinclair International and David H. Sinclair, its president, (jointly referred to as Sinclair), alleging that Maxfield's forced retirement on December 31, 1980, a month after his 65th birthday, violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1982) (as amended). There was a bifurcated trial before a jury. The jury first found in Maxfield's favor on liability, and then, in the damages phase, awarded $33,398 for past damages and $7,500 for future damages through special interrogatories. On appeal, Sinclair contends that the evidence did not establish a prima facie case of discrimination and that the district court erred in various determinations with respect to damages. We will affirm.

I.

FACTS

Maxfield was employed at Sinclair from 1940 until 1980, except for a three-year absence during World War II. He began working by servicing various parts manufactured and sold by Sinclair to paper mills, and was promoted in 1957 to a sales position which he retained until his termination.

At trial, Maxfield testified that the first time retirement was mentioned to him was the May before

his 65th birthday when he went to the company headquarters to pay a condolence call on David Sinclair after the death of his father, the company's founder. Maxfield related the conversation as follows:

> David said, "You are going to be 65 come the end of the year when you are going to retire."
>
> I said, "No, I am not going to retire, David."
>
> He said, "Yes, you are going to retire, Jim. We are going to retire you."
>
> And I said, "Well, you can work until you are 70 now and that is my desire, to work until 70."
>
> And he said, "Well, Jim, if you do not retire as we wish we will find reasons to retire you."

T. 1.29.

A month later, Maxfield learned that he would be replaced by Robert Dunlap, a 42 year old who had recently been promoted from serviceman to part-time salesman. Maxfield wrote to Sinclair protesting the company's decision to retire him and requesting a meeting to discuss the matter further. At a sales meeting held in September, Sinclair reiterated without giving any reasons that Maxfield was to be retired.

Maxfield followed that meeting with another letter, again requesting an explanation for the company's decision. Sinclair returned the original of the letter with a handwritten notation that read as follows:

> Jim – You are beating a dead horse. I'm sorry you can't let it go and retire with dignity. I have protected you so you would have a chance to do that. Please accept the fact that it is time for a change. If you want to quit now let me know. If you want to continue to end year as agreed fine but I expect your full cooperation with Dunlap. Divine

and all others. If you can't do that there is no sense in going on."

Signed Dave.

T. 1.41.

At the conclusion of plaintiff's case, defendants moved for a directed verdict, arguing that Maxfield had failed to establish a prima facie case because Maxfield was replaced by a person between the ages of 40 and 70 who was himself within the class protected by the ADEA. The district court denied the motion, holding that plaintiff need not prove replacement by a person outside the protected class and that the evidence was sufficient to permit the jury to find that Maxfield was terminated because he had reached his 65th birthday.

As its defense, Sinclair asserted that Maxfield was terminated because of unsatisfactory job performance. Sinclair confirmed that Maxfield was forced to retire and stated he had not been told that his poor performance over the past several years was the real reason for his termination to avoid upsetting him. Much of the trial was devoted to testimony about Maxfield's sales performance and a comparison of the performances of Maxfield and Dunlap.

At the conclusion of the liability phase of the bifurcated trial, the jury was instructed, *inter alia*, as follows:

> I have already told you that the plaintiff bears the burden, bears the burden of proof, and he must prove by a preponderance of the evidence that he was prevented from continuing as an employee because of his age. Now, to satisfy this burden, the plaintiff must show that the plaintiff's age was a determining factor in the defendants' decision to retire him.
>
> What do we mean by that? Well, that is the

> plaintiff must show that but for his age he would not have been retired.
>
> Stated another way, the plaintiff must prove that age was a determining factor in the decision to retire him, and a determining factor is a factor considered by the employer which made a difference in the decision, and to go back to what I told you before, the plaintiff must show that but for his age he would not have been retired.

T. 4.154. The district court's explanation of plaintiff's burden of proof was a correct statement of the law of this circuit, *see Bellisimo v. Westinghouse Electric Corp.*, No. 84-3375, slip op. at 7 (3d Cir. June 11, 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 105 S. Ct. 592 (1984); *Smithers v. Bailar*, 629 F.2d 892, 896 (3d Cir. 1980), and Sinclair did not object. The jury returned answers to special verdict interrogatories, finding that "age was a determining factor in the defendants' decision to require [Maxfield] to retire" and that Maxfield failed to prove a willful violation of the ADEA. We turn first to Sinclair's claim that Maxfield failed to establish a prima facie case.

II.

PRIMA FACIE CASE

Congress expressly set forth in the ADEA that its purpose in enacting the statute was "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). The statute makes it unlawful for a covered employer to discharge or involuntarily retire any individual below the age of 70 because of age. 29 U.S.C. § 623(a). The plaintiff has the initial burden of offering evidence that

is sufficient "to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (construing Title VII, 42 U.S.C. § 2000e *et seq.*). Plaintiff may satisfy that burden by offering direct or circumstantial evidence. Direct evidence would include statements by the employer to the employee that s/he was being fired because of age. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981). Because such direct evidence will often be difficult to obtain, the guidelines used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for establishing a prima facie case in Title VII cases have been adapted to ADEA cases. *See Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 565 & n.11 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984); *Smithers v. Bailar*, 629 F.2d 892, 894 (3d Cir. 1980).

As originally articulated, the *McDonnell Douglas* test provided that a prima facie case of racial discrimination could be established by plaintiff showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnote omitted).

Sinclair argues that the fourth element of *McDonnell Douglas* requires proof in an ADEA case that the plaintiff was replaced by someone outside the protected class. No case holds that an ADEA plaintiff can recover only if s/he was replaced by someone younger than 40, and there is no reason to engraft the

requirement on to the law.[1] In *Smithers v. Bailar*, the district court had determined that a prima facie case could be established by showing "that the position was ultimately filled by an employee who was younger than plaintiff." We quoted the district court without suggesting that the standard was incorrect. 629 F.2d at 895.

Courts that have addressed this issue squarely have universally permitted a prima facie case to be shown through proof that the favored person was younger than plaintiff. All have held that the replacement need not be younger than 40, the age at which ADEA protection begins. *See Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir. 1985); *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980); *cf. Haskell v. Kaman Corp.*, 743 F.2d 113, 119 n.1 (2d Cir. 1984) (*McDonnell Douglas* test framed as requiring proof of favorable treatment to a younger person rather than a person outside the protected class); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982) (same); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982) (same).

In *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 562 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2658 (1984), the court held that the fourth element of the *McDonnell Douglas* test could be satisfied by proof

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1. The language in Massarsky v. General Motors Corp., 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 104 S. Ct. 348 (1983), that a plaintiff "need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably," repeated in Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d at 1395, was used in the context where the favored employees were in fact under 40 but neither opinion suggests that is a *sine qua non* for recovery. In fact, elsewhere in each opinion, we stated that a prima facie case will be made by showing replacement by a "younger" employee. *Duffy*, 738 F.2d at 1395 n.2; *Massarsky*, 706 F.2d at 118 n.13.

of either replacement by someone outside the protected class or by someone younger or by other proof that the discharge was because of age. That court had earlier recognized that age, unlike race or gender, is not an immutable characteristic, and that the realities of the workplace may demand that the replacement be experienced, thereby increasing the risk that the replacement might be over 40. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980).

Policy considerations support holding that a prima facie case may be established through proof of replacement by a younger person. If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40.

The probative value of the age of the replacement as evidence of discrimination will depend on the circumstances of the case. Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference. *See Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435. *Accord Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

Sinclair's suggestion that if its construction of the statute were not accepted, "courts would be opening their doors to claims for discrimination under [the ADEA] by 45 year old employees replaced by 48 year olds." Brief for Appellant at 22, is frivolous. Moreover, we see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive of discrimination but is merely one

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element in a set of circumstances that may give rise to an inference of discrimination. If the difference in ages of the two employees were insignificant, the district court would likely find that the evidence was insufficient to permit an inference of discrimination.

Consequently, we hold that an ADEA plaintiff may establish the fourth element of the *McDonnell Douglas* test for a prima facie case by showing that s/he was replaced by a person sufficiently younger to permit an inference of age discrmination.[2] Maxfield's replacement by an employee more than 20 years younger was sufficient to satisfy this test.

III.

SOCIAL SECURITY BENEFITS

During the damages phase of the trial, the district court held that Maxfield's Social Security benefits could not be set off against damages, but it permitted Sinclair to introduce evidence of those benefits for the limited purpose of showing that Maxfield failed to use his best efforts to mitigate damages. The jury awarded damages for lost past earnings in the amount of $33,398.

Sinclair argues that the district court's failure to set off the Social Security benefits received by Maxfield against the backpay award resulted in a double recovery for Maxfield and an improper penalty against Sinclair whose violation of the ADEA was found by the jury not to be willful. In the only case on point, *Wise v. Olan Mills, Inc. of Texas*, 495 F. Supp. 257 (D. Colo.

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2. Maxfield argues that he did not need to satisfy *McDonnell Douglas* because he presented direct evidence of discrimination. While we agree that direct evidence may also establish a prima facie case, we need not evaluate the sufficiency of direct evidence in light of our holding that he adequately established a circumstantial case under *McDonnell Douglas*.

1980), the court found that Social Security benefits should not be offset. Even more significant for us is that the reasoning applied by this court in two recent cases dealing with setoffs supports the district court's action here.

In *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983), we held that unemployment compensation should not be deducted from a Title VII backpay award.[3] We reasoned that Congress had explicitly required a deduction for interim earnings and amounts earnable with reasonable diligence and that its failure to provide for other setoffs should be given effect. *Id.* at 82. We also noted that the NLRB has refused to deduct those benefits in actions brought under the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1982), the act that served as the model for Title VII's backpay provision. We presumed from Congress' failure to alter the language to require a different construction that it intended a similar construction. *Id.* at 82-83.

Under the collateral source rule payments under Social Security, welfare programs, unemployment compensation and similar programs have all been treated as collateral benefits which would not ordinarily be set off against damages awarded. In *Craig*, we rejected the argument that the collateral source rule provided plaintiffs with an inequitable

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3. Earlier, in Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), on which Sinclair relies, we affirmed a backpay award in which the district court had deducted unemployment compensation benefits, but the propriety of that setoff was neither raised nor decided. Subsequently, in Rodriguez v. Taylor, 569 F.2d 1231, 1243 n.23 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), we declined to "pass[] judgment on the wisdom" of Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977), in which the court permitted a setoff of unemployment compensation.

double recovery, finding "no reason why the benefit should be shifted to the defendant. . . ." *Id.* at 83. Relying on the Supreme Court's decision in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951), upholding the NLRB's practice, we concluded that unemployment benefits were collateral. *Id.* at 83-84.

Finally, we found that the objectives of ending employment discrimination and compensating victims in a make whole fashion would be furthered by a rule precluding deduction of the benefits. *Id.* at 84. We also rejected the argument that the decision whether to offset should be left to the discretion of the district court, favoring instead "to fashion uniform rules . . . to further the statutory objectives. . . ." *Id.* at 85.

In *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 215-17 (3d Cir. 1984), *vacated and remanded on other grounds*, 105 S. Ct. 1159 (1985), we applied *Craig* in an ADEA action and held that unemployment benefits could not be offset. We stated that "the reasons supporting this court's decision concerning Title VII in *Craig* apply even more so to [a] case involving the ADEA," *id.* at 217, because unlike Title VII, backpay under the ADEA is not discretionary, since it incorporates the provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (1982),[4] making backpay

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4. Some of the provisions of the FLSA were altered to provide in the ADEA for the addition of injunctive relief in suits brought by private individuals, *compare* Powell v. Washington Post Co., 267 F.2d 651 (D. C. Cir. 1959) (injunctive relief only available in suits brought by the Secretary) *with* 29 U.S.C. § 626(b) (permitting equitable relief "[i]n any action brought to enforce" the ADEA); to change the circumstances under which liquidated damages were available, *compare* 29 U.S.C. § 260 (1982) (liquidated damages may be reduced or disallowed if employer shows action was in good faith or with reasonable grounds to believe it did not violate FLSA) *with* 29 U.S.C. § 626(b) (liquidated damages available only for willful violations of the ADEA); and to decline to borrow the criminal penalty in the FLSA, 29 U.S.C. § 216(a) (1982).

a mandatory element of damages. 29 U.S.C. § 626(b).[5]

We also held in *McDowell* that pension plan benefits were indistinguishable from unemployment compensation and should not be deducted from the backpay award. Both were designed to serve social policies independent of those served by a backpay award. Thus, we extended the holding of *Craig* to pension plan benefits in order not to "dilute the purpose of ending discrimination." 740 F.2d at 217.

Our later decision in *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), which permitted a setoff, is not to the contrary because the result turned on the particular factual situation presented. In *Dillon*, the employer was the state which, under state law, had the right to recover the benefits received. *Id.* at 1002. We saw "no reason to require the state to file a separate suit to recoup" the benefits and therefore permitted the reduction. *Id.* at 1007. Nothing in the *Dillon* decision undermines the validity of *Craig* in suits against private employers, as here.

The reasoning of *Craig* holding no setoff of

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5. Backpay is a discretionary remedy under Title VII even though it "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (footnote omitted). Once a court has decided to award backpay, however, plaintiffs suing under Title VII and the ADEA are standing on the same footing. *McDowell*, 740 F.2d at 216-17. Although Title VII contains an explicit requirement that interim earnings be deducted, and the ADEA does not, courts have held that the ADEA does require mitigation of damages and have consistently deducted interim earnings from backpay awards. *See, e.g.*, Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 119 (4th Cir. 1983); Coleman v. City of Omaha, 714 F.2d 804, 808 n.5 (8th Cir. 1983); Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 756-57 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).

unemployment benefits in a Title VII case, and *McDowell* applying the same holding to the ADEA, governs this case. There are no significant discernible differences between Social Security benefits, unemployment benefits and pension benefits for this purpose. All would ordinarily be received by an employee, such as Maxfield, only after s/he has been discharged or involuntarily retired. Social Security benefits also are regarded as a collateral source, *see Smith v. United States*, 587 F.2d 1013, 1015-18 (3d Cir. 1978) (suit brought under Federal Tort Claims Act), and as in *Craig*, we see no reason why the benefit of the collateral funds should shift to the defendant. The quotation relied upon in *McDowell* is equally applicable here:

> Since no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

NLRB v. Gullett Gin Co., 340 U.S. at 364 (emphasis in original); *quoted in McDowell*, 740 F.2d at 217-18 (footnote omitted). As between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer. Moreover, permitting a deduction of Social Security benefits could effectively eliminate the benefit of the ADEA to employees in the 65 to 70 age group, since all would presumably be entitled to Social Security benefits. Such an effect would be inconsistent with the congressional purposes in extending the ADEA to that age group. 29 U.S.C. § 631(a) (1982) (amending 29 U.S.C. § 631(a) (1976) to increase maximum age to 70).

Sinclair contends the failure to offset the benefits

is punitive because the jury found the violation was not willful. This misconstrues the statutory effect of such a finding. If the violation is found to have been willful, the statute requires doubling the damages. 29 U.S.C. § 626(b). Sinclair thus has received the benefit of the jury's finding by the district court's failure to double. That finding should not affect the manner in which the compensatory damages are computed.

In connection with Sinclair's claim that Maxfield failed to mitigate damages, the district court admitted the testimony as to Maxfield's Social Security benefits and Sinclair was permitted to, and did, argue to the jury that Maxfield was better off after his forced retirement. The jury apparently believed otherwise. We see no reason to disturb its verdict.

IV.

FRONT PAY

Sinclair's other principal contention is that the jury's award of $7,500 for front pay should be set aside. It maintains that front pay is not an available remedy under the ADEA and that even if it is, it should not have been awarded in this case because Maxfield failed to request reinstatement. The trial judge in this case rejected both contentions, as do we for the same reasons.

Although this court has not yet spoken on whether an award of future lost earnings is precluded by the ADEA, having reserved that issue in *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (3d Cir. 1980), the line of cases we find most persuasive allows such an award. As Judge Weinfeld wrote in *Koyen v. Consolidated Edison Co. of New York*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983), "To deny [authority to grant front pay] would defeat a purpose of the Act to make a victim of discrimination 'whole' and to restore him to

the economic position he would have occupied but for the unlawful conduct of his employer."

Moreover, it is significant that whereas the FLSA has no provision for future damages, when Congress enacted the ADEA it added the following provision to the remedies taken from the FLSA:

> In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.

U.S.C. § 626(b). The inclusion of equitable relief strengthens the conclusion that Congress intended victims of age discrimination to be made whole by restoring them to the position they would have been in had the discrimination never occurred.

Front pay, an award for future earnings, is sometimes needed to achieve that purpose. Ordinarily, an employee would be made whole by a backpay award coupled with an order for reinstatement. Reinstatement is the preferred remedy to avoid future lost earnings, but reinstatement may not be feasible in all cases. *See Goldstein v. Manhattan Industries, Inc.*, 758 F.2d at 1438-49. There may be no position available at the time of judgment or the relationship between the parties may have been so damaged by animosity that reinstatement is impracticable. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984), *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). In such circumstances, the remedial purpose of the

statute would be thwarted and plaintiff would suffer irreparable harm if front pay were not available as an alternate remedy to reinstatement. *Whittlesey*, 742 F.2d at 728. Since reinstatement is an equitable remedy, it is the district court that should decide whether reinstatement is feasible. *See Goldstein v. Manhattan Industries, Inc.*, 758 F.2d at 1448; *Davis v. Combustion Engineering*, 742 F.2d 916, 923 (6th Cir. 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 (8th Cir. 1982). *See also* Crawford and McRae, *Front Pay in Lieu of Reinstatement as a Remedy in ADEA Litigation*, 9 Empl. Rel. L.J. 705, 708 & n.11 (1984). Of course the amount of damages available as front pay is a jury question.

We agree with Judge Broderick, the trial judge in this case, that an award for future lost earnings is no more speculative than awards for lost earning capability routinely made in personal injury and other types of cases. The plaintiff's duty to mitigate damages should serve as an effective control on unjustified damage awards. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d at 728.

In this case, counsel for Sinclair argued strenuously to the jury that Maxfield had not taken reasonable steps to mitigate and therefore neither front pay nor backpay should be awarded. Counsel stressed that because of the amount of Maxfield's income from Social Security and other sources, it would have been unrealistic for him to attempt to find alternate employment. The jury rejected the argument that Maxfield failed to mitigate, and we find no basis for setting aside its decision.

Alternately, Sinclair argues that Maxfield waived his right to request front pay by failing to request reinstatement. Sinclair relies on our decision in *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), to support its contention that Sinclair waived the issue.

We agree with the district court that *Wehr* is distinguishable.

In *Wehr*, plaintiff, who had been discharged from his job as an engineer when he was 44, had thereafter entered law school, which he had completed by the time of trial. He had not requested any future relief in his complaint and had specifically disclaimed any desire for reinstatement in his former position as an engineer during pretrial proceedings. *Id.* at 283 nn.17 & 18. Under these circumstances, the court ruled that Wehr had removed the issue of future damages from consideration.[6] In contrast, here, the complaint contained a specific request for future damages, thereby preserving the issue. Since the district court found that in the present case "reinstatement would clearly be an undesirable remedy," App. at 20, the front pay award was permissible. *See EEOC v. Prudential Federal Savings and Loan Association*, Nos. 82-2444, 83-1073, slip op. at 15 & n.2 (10th Cir. May 28, 1985).

We find no error in the district court's determination that reinstatement was not feasible for Maxfield, and see no reason to set aside the jury's damage award.

V.

EXPERT TESTIMONY

Finally, Sinclair argues that future damages were not available because no expert testified to establish Maxfield's projected earnings and to reduce those

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6. Similarly, in Kolb v. Goldring, Inc., 694 F.2d 869 (1st Cir. 1982), cited by Sinclair, plaintiff had succeeded in finding alternate employment two months after his discharge, and plaintiff was held entitled to collect backpay during the period it took for his salary at his new job to exceed that which he would have earned at his old job. It appears that reinstatement was not an issue in the case and therefore front pay in lieu of reinstatement was foreclosed.

earnings to present value. In *Kolb v. Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982), on which Sinclair relies, plaintiff sought to recover a raise that he claimed he would have received had he remained employed. The court held that in the absence of expert testimony, patterns of past pay increases or similar objective evidence, proof of future raises was too speculative to support the full jury award. *Id.* at 873. Maxfield, however, based his request for front pay only upon his former earnings history. There were no projections in earnings for which expert testimony was required. Nor do we believe that expert testimony was needed to reduce the damage award to present value. We agree with the district court that Maxfield's agreement to reduce the award by 10% was favorable to Sinclair and find no error with the court's taking judicial notice of the fact that experts had consistently testified to a rate that would have been considerably less favorable to Sinclair.

VI.

CONCLUSION

For the reasons set forth above, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES L. MAXFIELD	:	CIVIL ACTION
	:	
v.	:	
	:	
SINCLAIR INTERNATIONAL	:	
and DAVID H. SINCLAIR,	:	
President of SINCLAIR	:	
INTERNATIONAL	:	NO. 82-1911

MEMORANDUM

BRODERICK, J. August 8, 1984

The plaintiff, James Maxfield, brought this action against Sinclair International and its president, David Sinclair, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (ADEA). A jury found that the plaintiff proved by a preponderance of the evidence that age was a determining factor in the defendants' decision to require him to retire, but found that the plaintiff did not prove by a preponderance of the evidence that the defendants acted willfully in violating the ADEA. The jury assessed damages for past loss of earnings at $33,398.00 and for future loss of earnings at $7,500.00.

The defendants have advanced five contentions in support of their motion for judgment notwithstanding the verdict and/or a new trial: (1) the plaintiff failed to establish a *prima facie* case of discrimination; (2) the "plaintiff failed by a preponderance of the evidence to establish that defendants had violated the (ADEA)"; (3) the Court erred in allowing the plaintiff to present a claim for future loss of earnings; (4) the future loss of earnings award was unsubstantiated and lacked a proper foundation of expert testimony; and (5) the jury should

have been instructed to set off the plaintiff's Social Security benefits against the damages awarded. Since none of these contentions supports the grant of a new trial or judgment notwithstanding the verdict, the defendants' motion will be denied.

Establishment of a prima facie case

The defendants contend that to establish a *prima facie* case of discrimination a plaintiff must show that his employer replaced him with someone outside the group protected by the Act, that is, someone under the age of forty. Since the plaintiff's replacement was forty-two years old, the defendants claim that the plaintiff did not prove a *prima facie* case. This Court has stated that a plaintiff establishes a *prima facie* age discrimination case when he shows that:

> (1) he was within the age group protected by the ADEA: (2) he was qualified for the job he held; (3) he was discharged, and (4) the position was filled with a younger employee or employees.

Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209, 1217 (E.D. Pa. 1982) (*citing Smithers v. Bailar*, 629 F.2d 892, 894-95 (3d Cir. 1980)). Under the standard applicable in this circuit, the plaintiff established all the elements of a *prima facie* case by showing that, though qualified, he was discharged at age 65 and replaced with a younger employee. Other cases stating that a plaintiff satisfies the final element of a *prima facie* case by showing he was replaced by a younger employee include *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 562 (5th Cir. 1983); *Cuddy v. Carmen*, 694 F.2d 853, 857 (D.C. Cir. 1982); and *Miller v. General Electric Co.*, 562 F. Supp. 610, 617 (E.D. Pa. 1983).

The defendants have cited a number of cases in support of their contention that the plaintiff must show he was replaced by someone outside the protected class.

These cases do state that replacement by an employee outside the protected class is the fourth element of a *prima facie* case, but none of them hold that replacement by a younger employee will not fulfill this requirement. The defendants have provided nothing which shows that the language in these cases was intended to deny use of the *prima facie* case to plaintiffs replaced by employees over forty. Indeed, a number of the cases cited are from the Fifth Circuit which has explicitly stated that a *prima facie* case can be made by proving that a qualified member of the protected class was discharged and replaced by a younger person. *Elliott*, 714 F.2d at 562. The defendants' contention that the plaintiff did not make out a *prima facie* case is without merit.

Sufficiency of the evidence

The defendants contend that the jury verdict cannot stand because the plaintiff failed to establish an ADEA violation by a preponderance of the evidence. This Court is not free to make the *de novo* review of the evidence the defendants are requesting.

> Motions for a new trial require the exercise of discretion by the Court, whose "duty is essentially to see that there is no miscarriage of justice." 6A *Moore's Federal Practice* ¶59.08[5], at 59-160 (footnote omitted) (2d ed. 1974); *Thomas v. E.J. Korvette, Inc.*, 476 F.2d 471, 474-75 (3d Cir. 1973). The jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The Court may not substitute its own judgment for that of the jury merely because the Court may have reached a different conclusion. To grant a motion for judgment n.o.v., the Court must find as a matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970).

> Such a motion "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A *Moore's, supra,* ¶50.07[2], at 50-77 (footnote omitted); *Korvette, supra,* at 474.

Douglas W. Randall, Inc. v. AFA Protective Systems, Inc., 516 F. Supp. 1122, 1124 (E.D. Pa. 1981), *aff'd mem.* 688 F.2d 820 (3d Cir. 1982).

The plaintiff provided sufficient evidence to support the jury's verdict under either the new trial standard or the JNOV standard. At trial the defendants contended that the plaintiff was fired because his job performance was unsatisfactory. The plaintiff contended that he was not told at the time he was fired that his performance was unsatisfactory. He also introduced evidence to show that his performance was in fact satisfactory, and that the defendants' allegations that he was not performing satisfactorily were pretextual. Once a plaintiff has established a *prima facie* case of discrimination, "a showing that a proffered justification is pretextual is itself *equivalent* to a finding that the employer intentionally discriminated." *Duffy v. Wheeling Pittsburgh Steel Corp.*, No. 83-1776, slip op. at 5 (3d Cir. July 10, 1984).

There was sufficient evidence from which the jury could have found that the plaintiff was performing satisfactorily before his termination and that his replacement was not doing a better job. Indeed, the defendants in their post-trial memorandum have not contended that there was insufficient evidence for a rational jury to find that the defendant's proffered explanation was pretextual. The plaintiff testified that he was told reasons would be found to fire him if he did not voluntarily retire at age 65. He was fired one month after his 65th birthday. Finally, there was evidence that the defendants were unaware that the ADEA protected employees up to the age of 70 from age discrimination. The defendants

appeared to be under the impression that nothing prohibited them from firing the plaintiff on the basis of age after he reached age 65. The above constitutes sufficient evidence in the record to preclude this Court from granting the defendants' motion for JNOV or a new trial on the ground of insufficiency of the evidence.

Award of damages for future loss of earnings

The defendants contend that the plaintiff should not have been permitted to advance a claim for future loss of earnings because the plaintiff waived any such claim by not requesting reinstatement and because such relief is in any event not available under the ADEA. The plaintiff also contends that the jury's award for future lost earnings was not supported by competent expert testimony. The Court does not accept these contentions.

In *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (1980), the Third Circuit held that an ADEA plaintiff could not obtain future lost earnings where he had "removed this issue from consideration" by specifically disclaiming any desire for reinstatement at the time of the pretrial conference. The defendants claim that *Wehr* controls his case because the plaintiff did not ask for reinstatement in his complaint or in the pretrial order.

Wehr is distinguishable from the present case. The plaintiff here has at no time disclaimed his desire for prospective relief. Moreover, his complaint asks for "back pay for all wages lost as a result of his forced retirement, and for *pay* until age 70 for wages lost as a result of such involuntary termination." The plaintiff also stated in the pretrial order that he sought damages for earnings lost from the time of his termination to November, 1985, the month of his 70th birthday. The plaintiff thus requested both in his complaint and in the pretrial order that he receive damages for the period from the time of trial to November, 1985. In the *Wehr* case it is apparent that the

plaintiff did not ask for *either* future lost wages *or* reinstatement in his complaint. *Wehr v. Burroughs Corp.*, 619 F.2d at 283-84. Moreover, in *Wehr* the plaintiff specifically disclaimed any desire for reinstatement at the pretrial. Indeed, Wehr made no attempt to amend his pleadings to request reinstatement or equivalent monetary relief until the conclusion of the trial. 619 F.2d at 284 n.19. Since neither of the circumstances which constituted waiver of the right to future lost earnings in *Wehr* is present in this case, *Wehr* does not compel this Court to foreclose the plaintiff's claim for future lost earnings.

The defendants also contend that an award of future lost earnings is precluded by the ADEA whether or not the plaintiff has waived such an award during the course of the litigation. The Third Circuit has not yet spoken to this issue, and courts elsewhere have reached varying conclusions. *See Koyen v. Consolidated Edison Co. of New York*, 560 F. Supp. 1161, 1167 n.33 (S.D.N.Y. 1983) (collecting cases). The Court was persuaded at trial that *Koyen* was correct in allowing an award for future lost earnings. The award is no more speculative than awards for lost earning capacity routinely made in personal injury and other types of litigation, and it assures that the plaintiff will be "made whole" for discrimination. *Koyen*, 560 F.Supp. at 1168. *See Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). It is illogical to make the amount of a plaintiff's award dependent on the date of the trial, since the date of trial bears no relationship to the harm suffered. Such a rule would also encourage delay. Finally, no purpose is served by requiring a plaintiff to request reinstatement in every case. In some cases, such as the present one, reinstatement would clearly be an undesirable remedy. For the above reasons, the Court does not believe it was error for the plaintiff to request, and the jury to award, damages for future loss of earnings. *Accord, Ventura v. Federal Life Insurance Co.*, 571

F. Supp. 48 (N.D.Ill. 1983); *Whittelsey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330-31 (S.D.N.Y. 1983).

The defendants also contend that the Court erred in permitting the jury to award damages for future loss of earnings without the introduction of expert testimony in support of the award. The defendants contend that such testimony was necessary to establish the plaintiff's probable future economic position, and to provide a basis for the discounting of the award to present value. The defendants' contentions on this point are not persuasive.

As to damages for future earnings losses, the federal rule has always been that the award must be reduced to account for the interest which can be earned on a sum awarded at trial. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541, 2550 (1983); *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916). In *Pfeifer*, the Supreme Court outlined various approaches accounting for inflation and interest rates in awards for future lost earnings. One method approved in *Pfeifer* reduces to present worth by using the "real interest rate", defined as the difference between the market interest rate and the inflation rate, as the discount rate. Justice Stevens suggested in *Pfeifer* that a real interest rate of between one and three percent was a realistic choice. 103 S.Ct. at 2556.

In the present case the plaintiff, in lieu of presenting expert testimony as a basis for reduction to present value, requested that the Court instruct the jury to reduce the amount of any future lost earnings award at the rate of ten percent per year. The Court had no hesitancy in so instructing the jury in view of the fact that this rate is far more unfavorable to the plaintiff than the rates approved in *Pfeifer*. The Court took judicial notice of the fact that at the time of trial experts in the field were not predicting real interest rates in excess of ten percent per year, nor had such experts done so in the past. Indeed, over the past ten years the real interest rate has never equaled or exceeded ten percent, and it has often been

below zero percent. Townsend-Greenspan & Co., The Growth of Real Interest Rates (chart), N.Y. Times, Sept. 12, 1983, at D1. The defendants have been unable to show that they were prejudiced in any way by the Court's instruction to the jury on discounting to present value, as an instruction wholly favorable to them was agreed to by the plaintiff.

There was a great deal of testimony in the record as to what the plaintiff made before his termination, what his replacement earned, and the conditions in the industry. The jury had a more than adequate basis for making the relatively uncomplicated determination as to what the plaintiff would have earned for the 21-month period from the time of trial in February, 1984 to November, 1985, the month of his 70th birthday. The evidence was more than sufficient to support the jury's relatively modest award of $7,500.00 in damages for this period to the plaintiff who earned well over $20,000.00 in the year before his dismissal.

Social Security set-off

The defendant contends that the Court should have instructed the jury to subtract the amount of the Social Security benefits the plaintiff received after the time of his termination from any damages awarded for loss of earnings. The Court refused this instruction on the authority of *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983). The Court did, however, with the plaintiff's agreement, instruct the jury to subtract the amount the plaintiff received from the defendants in pension benefits. Although *Craig* was a Title VII case, the Court determined that its reasoning should apply to an ADEA case as well. (N.T. 6.60). The defendants have contended in their post-trial motion that *Craig* should be distinguished because the Title VII remedial scheme differs from that of the ADEA. This argument is foreclosed by *McDowell v. Avtex Fibers, Inc.*, Nos. 83-1434, 83-1455

(3d Cir. July 12, 1984), which holds that neither unemployment compensation benefits nor pension plan benefits should be deducted from ADEA back pay awards. In *McDowell*, the Third Circuit could find "no persuasive reason" for reaching a result different from that reached in *Craig* "simply because this case involves an ADEA violation rather than a Title VII violation." slip op. at 5.

For all the above reasons, the defendants' motion for judgment notwithstanding the verdict and/or a new trial will be denied. The Court also has before it the plaintiff's motion for an award of attorney's fees. The Court believes that the interests of judicial economy and fairness are best served by ruling on this motion after it is determined whether an appeal will be taken in this matter and, if so, after that appeal is finally determined. The defendants are advised that the pendency of the attorney's fee petition does not affect the time period within which the appeal on the merits of this case must be filed. *West v. Keve*, 721 F.2d 91 (3d Cir. 1983).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES L. MAXFIELD	:	CIVIL ACTION
	:	
v.	:	
	:	
SINCLAIR INTERNATIONAL	:	
and DAVID H. SINCLAIR,	:	
President of SINCLAIR	:	
INTERNATIONAL	:	NO. 82-1911

ORDER

AND NOW, this 8th day of August, 1984, upon consideration of the defendants' motion for judgment notwithstanding the verdict and/or for new trial, and the plaintiff's response thereto, for the reasons stated in this Court's Memorandum of August 8th, 1984.

IT IS HEREBY ORDERED that the defendants' motion for judgment notwithstanding the verdict and/or for new trial is DENIED.

RAYMOND J. BRODERICK, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1518

JAMES L. MAXFIELD

v.

SINCLAIR INTERNATIONAL and
SINCLAIR, DAVID H., President
of Sinclair International,

Appellants

(D.C. Civil No. 82-1911)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

Present: HUNTER and SLOVITER, *Circuit Judges* and
COHEN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 13, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 23, 1984, and made final

---

*Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

Certified as a true copy and issued in lieu
of a formal mandate on August 6, 1985.
Test: Sally Mrvos
Clerk, U.S. Court of Appeals for the Third Circuit

by the order entered August 10, 1984, be, and the same is hereby affirmed. Costs taxes against appellants.

ATTEST:
Sally Mrvos
Clerk

July 3, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1518

JAMES L. MAXFIELD

v.

SINCLAIR INTERNATIONAL and
DAVID H. SINCLAIR, President of
SINCLAIR INTERNATIONAL,

Appellants

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and COHEN, *District Judge**

The petition for rehearing filed by Appellants, Sinclair International and David H. Sinclair, President of Sinclair International, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Dolores K. Sloviter
Circuit Judge

Dated: July 29, 1985

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*Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-731

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES L. MAXFIELD
v.
SINCLAIR INTERNATIONAL and DAVID H. SINCLAIR,
President of Sinclair International,
Petitioners

BRIEF IN OPPOSITION TO A GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court below erred in prohibiting the Jury from considering Social Security benefits received by Plaintiff after his employment termination as a set-off against any damages to which the Plaintiff was entitled.

2. Whether the Court below erred in permitting Plaintiff to present evidence and secure recovery for front pay damages beyond the date of the Trial when Plaintiff requested front pay in the Complaint and other appropriate remedies.

3. Whether the Court erred in permitting Plaintiff to present evidence regarding front pay loss without the use of expert testimony when Defendants cannot show any harm and in fact were benefitted by the manner of presentation of the evidence.

4. Whether Plaintiff needs to establish the fact that the Plaintiff was replaced by an employee outside the protected age group, i.e. under age forty (40), or merely establish the fact that plaintiff's replacement was substantially younger, especially in light of the fact that there was direct proof of age discrimination.

PARTIES

All parties to the proceeding in the United States Court of Appeals for the Third Circuit are Noted in the caption of this Brief in Opposition to the Petition for Certiorari.

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No. 85-731

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES L. MAXFIELD,
Respondent

v.

SINCLAIR INTERNATIONAL and DAVID H. SINCLAIR,
President of Sinclair International,
Petitioners

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 766 F.2d 788, and appears in the Apendix at A1. The Order of that Court denying rehearing appears in the Appendix at A. The Memorandum Opinion and Order of the District Court for the Eastern District of Pennsylvania is unreported and appears in the Appendix of Appellant's Petition.

STATEMENT OF THE CASE

This case was instituted by Plaintiff under the Age Discrimination in Employment Act, 29 U.S.C.A. §621, *et seq*. It was tried before the Honorable Raymond J. Broderick with a bifurcated Jury in February of 1984. The Trial resulted in a verdict in favor of the Plaintiff and against both Defendants. The damage phase of the Trial resulted in the Jury awarding, by way of special Interrogatories, the amount of $33,398 for past damages and $7,500 for future damages. Subsequent to Trial, the Defendants filed Motions for Judgment Notwithstanding the Verdict and/or For New Trial. On August 8, 1984, the Honorable Raymond J. Broderick filed a Memorandum and Order denying Defendants' Motions. On May 13, 1985, the case was argued in front of the Court of Appeals of the Third Circuit, which affirmed the judgment of the District Court.

STATEMENT OF THE FACTS

The relevant facts are as follows. In May of 1982, Plaintiff filed a Complaint alleging in Count 1 of the Complaint that the Defendants, Sinclair International and David H. Sinclair, violated the Age Discrimination in Employment Act by terminating Plaintiff as a direct result of his age. At the time of Plaintiff's termination, he was sixty-five (65) years and one (1) month old. Plaintiff contended in the Complaint that he was an individual that was in a protected age group and that he was replaced by an individual that was younger in age than the Plaintiff. Further, Plaintiff contended that he was at all relevant times performing his job in a satisfactory manner and that the Defendants terminated him based directly on his age. Plaintiff alleged in his Complaint and proved at Trial that in May of 1980, he was told by his employer, the Defendant, David H. Sinclair, that he was being terminated because he was attaining his sixty-fifth

(65th) birthday that year. Plaintiff contended in his Complaint and proved at Trial that he protested this termination since he planned to work until age seventy (70), but was told by the Defendant, David H. Sinclair, that he would be terminated at age sixty-five (65). Plaintiff turned sixty-five (65) in November of 1980 and one (1) month later, at the end of the year, he was forced to retire. The Complaint requested damages for various reasons, including a request for other legal and equitable remedies as the Court may see fit.

The Defendants denied the Plaintiff's allegations in the Complaint and contended in their Answer and at Trial that the Plaintiff's dismissal was due to poor job performance. It was stated nowhere in the Trial that the Plaintiff had been retained during his last few years so that he would be fully vested in his pension. In fact, the pretextual reason given at Trial by the Defendants was that the Defendants wanted the Plaintiff to be able to retire with full Social Security benefits, which he would not otherwise be entitled to if he retired before age sixty-five (65).

The evidence produced at Trial clearly revealed that Plaintiff was not only adequately performing his job, but in fact was one of the top salesmen in the company, and in a head-to-head comparison with his replacement, had done better than his replacement after adjustments for inflation and territorial changes.

Plaintiff worked for the Sinclair Corporation from 1940 through the end of 1980, and at the end of his termination, received Social Security benefits as Defendants brought out at Trial before the Jury. However, the Honorable Trial Court refused to allow that evidence to be used in the damage phase of the Trial, but merely on the question of Plaintiff's willingness to work in order to mitigate his damages.

At the conclusion of the Trial, the Jury rendered a verdict in favor of the Plaintiff for the damages stated above.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The Court Below properly prohibited the Jury from receiving evidence concerning the Plaintiff's receipt of Social Security benefits after his employment termination as a set-off against the damages to which Plaintiff is entitled.

It is an uncontested fact in the instant case that the Plaintiff throughout his forty (40) year work history with the Defendants contributed to the Social Security fund as required by law. These Social Security benefits are benefits that were vested in the Plaintiff at age sixty-two (62) to which he was entitled as a matter of law once he retired. At age sixty-five (65), Plaintiff would be entitled to his full share of Social Security benefits earned by him based on his contributions. While it might be true that Plaintiff would not have received Social Security benefits but for his termination, that same causation factor could be argued in every litigation involving some collateral source of payment.

In many instances where individuals are injured as a result of the neglience of others, these individuals have purchased disability insurance policies. It can be certainly said in those instances that but for the occurrence or happening of the accident that caused the injury, the injured party would not be eligible for such disability benefits. However, when the issue is tried before a Court and a Jury, the Jury is not permitted to receive any evidence concerning the disability benefits the injured party received based on the long-established principle of the Collateral Source Rule. *N.L.R.B. v. Gullett*, 340 U.S. 361, 71 S. Ct. 337 (1951).

However, Defendants misstate the evidence received by the Jury in this case. Extensive testimony was taken concerning the Plaintiff 's Social Security benefits and the amount he was receiving since his retirement. This testimony was admitted into evidence concerning

the question of Plaintiff 's mitigation of his damages after his termination. Defendants introduced the Social Security benefits to the Jury to try to establish that plaintiff was better off after his termination than before and, therefore, did not mitigate his damages properly. Therefore, the Jury had all of the information before it concerning the amount of money that Plaintiff had received by way of Social Security benefits from the date of his termination until the date of Trial, as well as all of his other earnings. Despite this knowledge, the Jury awarded those sums of money herein before mentioned.

Defendants attempt to reflect that the 1981 earnings received by Mr. Maxfield were in fact higher than his earnings prior to his termination. Of the $30,272.19 received by Mr. Maxfield, approximately $12,000 was from payments received from the pension of Sinclair International and which the Jury was told by Plaintiff to consider as set-offs from Plaintiff 's claims for lost wages during the year 1981. Subsequent to the Trial date, the Third Circuit Court of Appeals decided that neither Unemployment Compensation benefits nor Pension Plan benefits should be deducted from Age Discrimination in Employment Act awards for back pay. *McDowell v. Avtrex Fibers, Inc.*, 774 F.2d 2124 (3rd Cir. 1974); vacated and remanded on other grounds. 105 S. Ct. 1159 (1985). Therefore, Plaintiff in essence reduced the amount of damages presented before the Jury voluntarily when otherwise not required to do so. The Third Circuit has not specifically ruled on the issue of Social Security benefits being allowed as a set-off in Age Discrimination in Employment Act cases. The Defendants cite *Ostapowicz v. Johnson Bronze Company*, 541 F.2d 394 (3d Cir. 1976) as a case supporting their position. However, the *Ostapowicz*, Supra, decision was a confirmation by the Third Circuit of the lower Court's calculations without comment on those calculations. The Lower Court deducted Unemployment Compensation benefits received

in that case. Social Security benefits were not considered. Unemployment Compensation benefits can be distinguished as benefits paid entirely by the employer without contribution by the employee and, therefore, a substitution for wages as opposed to Social Security benefits, which is a social insurance for retirement. However, in light of the *McDowell,* Supra, decision, even Unemployment Compensation benefits would no longer be deductible and, therefore, *Ostapowicz,* Supra, has been tacitly overruled.

The weight of case law throughout the country is in overwhelming support of Plaintiff 's position and opposed to Defendant's arguments. In *Gathercole v. Globas Assocs.* 560 F. Supp. 642 (D.C. Cal. 1983) a Jury was instructed that they were not required to deduct early retirement benefits. In *Whatley v. Skaggs Companies, Inc.,* 707 F.2d 1129 (10th Cir. 1983) that Court held that there shall be no reduction by the Jury based on the collateral source of disability benefits.

Specifically on point in age discrimination cases are three decisions, *Wise v. Olan Mills, Inc.,* 495 F. Supp. 257 (D. Colo. 1980) and *E.E.O.C. v. Sandia Corporation,* 639 F.2d 600 (10th Cir. 1980). The reasoning of both *Wise* and *Sandia* is in accord with the general collateral source rule that was adopted by the United States Supreme Court in *Gullet,* Supra. Both *Wise* and *Sandia* hold that to allow set-off of Social Security benefits would unjustly enrich the Defendant, since Social Security benefits are benefits that Plaintiff has earned during his lifetime. Defendants have claimed that under the circumstances the Plaintiff would be receiving a windfall if the Social Security benefits were allowed. However, it was clearly stated in testimony at Trial that Plaintiff was ready, willing and able to return to work for the Defendant thus obviating claim that there was somehow or another a windfall.

The Trial Court relied on the case of *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77 (3d Cir. 1983) in ruling on this

issue. Defendants acknowledge that there is recent authority to the effect that the reasoning under the *Craig v. Y & Y Snacks, Inc.*, Supra, also applies to A.D.E.A. cases but attempts to distinguish it because it involves other benefits such as Unemployment Compensation. It is interesting to note that the case that Defendants refer to as recent authority is the *McDowell,* Supra, decision specifically rules that Unemployment Compensation and other benefits are not to be allowed as set-offs in A.D.E.A. cases. It is also peculiar that Defendants would request the Court to consider *Ostapowicz,* supra, a valid statement of the law whereinUnemployment Compensation benefits were deducted as a set-off and the calculations merely approved by the Third Circuit without comment but would ask the Court not to consider *Craig v. Y & Y Snacks, Inc.* and *McDowell,* Supra, as relevant precedent because they involved the same Unemployment Compensation benefits.

Finally, to allow the Defendants to have Social Security benefits deducted as a set-off would be to render the A.D.E.A. practically useless in all but a very few cases. Under Defendants' theory, only a high-paid executive that earns well in excess of Social Security benefits has any real stake in pursuing an A.D.E.A. claim, since the amount of Social Security benefits received would be small in comparison to the displaced executive's former salary. Yet, the average working man that earned the same amount of money that Plaintiff did in the instant case, would be entitled to virtually no recovery, since recovery would only be for those amounts in excess of Social Security benefits. An entire work force of people with salaries in the moderate range could be fired with impunity, since Social Security benefits would substitute for such a large portion of these lost wages that the prospects of recovery would not seem worth the effort.

It should be further pointed out that in those cases involving Unemployment Compensation benefits set forth in Defendants' brief, the Courts held that it was

discretionery with the Court to allow the set-off of Unemployment Compensation benefits. Accordingly, the standard of review would require that this Court find ar abuse of discretion on the part of the Lower Court which obviously does not exist upon the face of the record.

Further, those cases involving set-offs concerning Unemployment Compensation benefits citied by Defendants *Wilson v. Wehadkee Yarn Mills*, 32 E.P.D. Sec. 33,776 (N.D. Ala. 1983) and *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981) can be distinguished on the base of the fact that these benefits are supplied and paid for entirely by the employer without contribution by the employee. Whereas, Social Security benefits are earned by an employee and contributed to during the employee's work life.

2. The Courts below properly permitted Plaintiff to present evidence of future damages or front pay damages beyond the Trial date.

Defendants accurately point out that the Trial Court reconsidered its decision after initially ruling against allowing the introduction of evidence concerning front pay. However, it is not surprising that the Court reversed its position after a careful reading of the decision of *Wehr v. Burroughs Corporation*, 619 F.2d 276 (3d Cir. 1980). At first glance, *Wehr*, Supra, seems dispositive of the issue in favor of Defendants. However, the full relevant quotation of *Wehr* is as follows:

> "We will not decide whether future damages may be awarded in A.D.E.A. cases, however, because we are persuaded that Wehr has removed this issue from consideration. Any basis for calculating front pay would include the amount Wehr would have received had he continued to be employed by Burroughs beyond the Trial date. Of necessity, Wehr's argument that he is entitled to future damages in lieu of reinstatement presuppose that he

> wanted to be reinstated. At Pre-Trial, however, Wehr specificaly disclaimed any desire for reinstatement. We, therefore, conclude that the question whether future damages may be properly recovered in A.D.E.A. cases is not properly before us at this time".

Initially it is important to note that the decision of future damages had not been decided by the Third Circuit before the case sub justice and, therefore, that Circuit relied upon other Circuit Courts for guidance and persuasive authority. Secondly, and more importantly, Plaintiff Wehr specifically and actively disclaimed any desire for reinstatement. Wehr, by his counsel, wrote a letter to the Court and to opposing counsel disclaiming any desire for reinstatement. Obviously, that factual circumstance is clearly not present in the instant case. Plaintiff requested in his Complaint both back pay and front pay, as well as any other remedial and equitable relief that the Court deemed proper. If front pay is "in lieu" of reinstatement, then the request for front pay obviously contemplates the Plaintiff's request for either reinstatement or front pay. Secondly, Defendants were aware of Plaintiff's intentions from the outset of the Trial to request front pay. Thirdly, the pleading requirements under the Federal Rules of Civil Procedure require notice pleading and not actual pleading as required in State Court. In *Everco Industries, Inc. v. O.E.M. Products Co.*, 18 F.R. Serv. 2d 1319, 63 F.R.D. 662 (N.D. Ill. 1974) that Court held that a precise computation or manner of proof of damages need not be alleged in the prayer for relief where the claim states the basis and nature of the alleged legal wrongs and the amount of damages cannot be ascertained without certainty at the time the claim is filed. Obviously, that principle should be applied in the instant case.

It is also amply clear that within the ambit of requesting front pay and requesting the Court to grant other equitable and remedial relief as it deemed proper in

both the Complaint and the Pre-Trial Order the Plaintiff put the Defendants on notice of their claim in requesting the Court to fashion an appropriate remedy. Nowhere did the Plaintiff actively abandon his claim for future lost wages as in *Wehr*, Supra, Plaintiff attempted to ask Defendant, David H. Sinclair, if he would allow reinstatement of the Plaintiff. Thereafter, there was an objection and ensuing discussion at side bar (Trial Transcript pages 6.6 to 6.12). During the side bar Plaintiff made it quite clear that there was a prayer for remedial relief in the Complaint; that in the liability phase of the Trial that the Plaintiff requested reinstatement; that front pay was requested in the Complaint and at the Pre-Trial. The Court upon considering this argument at a later point in the Trial looked at the practical impact of *Wehr* that would not allow front pay and stated as follows:

> "The reasoning of it (Wehr decision) does not overwhelm me because I don't hesitate to say to you that the longer a Plaintiff stays out of Court the more money he gets and that doesn't seem to me to be something that was intended . . . (Trial Transcript page 6.62)".

The Trial Court found that the instant case differed from *Wehr* factually based on the request in the Complaint for front pay and remedial relief and the active withdrawal of the Plaintiff in *Wehr* of that issue from the Court.

The sentiments expressed by the Lower Court were expressed in *Ventura v. Federal Life Insurance Company*, 571 F.Supp. 48 (N.D. Ill. 1983) wherein the Court recognized that reinstatement can be inappropriate where a Plaintiff could not be merged back into the Defendant's work force without animosity. It is obvious from testimony at Trial that such was the case with Defendant, Sinclair International. Mr. Maxfield was a salesman that had his territory taken from him and given to another salesman that worked that territory for a period

of over three (3) years prior to the date of the Trial. It would seem quite inappropriate under the present factual circumstances to try to merge the Plaintiff back into the same sales territory after three (3) years of absence from the job.

The *Ventura*, Supra, decision weighed the various pros and cons of allowing front pay and adopted the view of the most comprehensive decision on this point of law to date set forth in *Koyen v. Consolidated Edison Company of New York, Inc.*, 560 F.Supp. 1161 (S.D.N.Y. 1983). It is interesting to note that the *Ventura* Court allowed an award for future benefits and stated:

> "To hold that such benefits are never available would run counter to the remedial purpose of the A.D.E.A. (Citations omitted) and would ignore the authority given District Court to award equitable relief beyond the specific wage or salary losses attributable to a wrongful employment action".

In *Koyen*, Supra, the Southern District of New York has not ruled in favor of Defendants' position. Rather, the much cited and much respected opinion of Judge Weinfeld not only held that future damages were allowable but went on to add that the withdrawal of a request of a former employee for reinstatement did not bar any future monetary awards under the A.D.E.A. There is a comprehensive discussion at pages 1167 through 1169 in *Koyen* of the various arguments for and against the allowance of future damages and the need for requesting reinstatement. Initially the Court debunks the argument that because the Fair Labor Standard Act is incorporated into the A.D.E.A. and because there is no provision for future relief in the Fair Labor Standard Act as there is in Title VII cases that the Congress clearly intended no such relief. The *Koyen* Court held that the incorporation into the A.D.E.A. of the additional §29 U.S.C. 626 (b) allowing equitable and remedial measures broaden the

act beyond the Fair Labor Standards Act scope to effectuate the purposes of the A.D.E.A. and allow future damages.

This holding is also set forth in *Pavlo v. Stiefel Laboratories, Inc.*, 22 F.E.P. 489 (S.D.N.Y. 1979) wherein the Court held that the mere fact the A.D.E.A. was incorporated into the F.S.L.A. was not to restrict damages but rather to prevent the creation of another bureaucracy. In accord *O'Donnell v. Georgia Osteopathic Hospital, Inc.* 574 F. Supp. 214 (N.D. Ga. 1982).

The *Koyen* decision also disposes of the issue that future damages are speculative in nature. When it stated:

> ". . .(T)that extreme situations may be envisioned does not warrant denial of relief in appropriate cases. The problem is more imaginary than real. Courts and Juries are not without experience in assessing damages for future loss of earnings in breach of employment contract and personal injury cases. Each can readily be decided upon its individual facts . . . the mere fact that damages may be difficult of computation should not exonerate a wrongdoer from liability.
>
> 'The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created'. (Citation omitted)
>
> Moreover, to restirct the employee to losses sustained from the date of discharge to the date of the return of the verdict or entry of judgment would encourage the employee to delay the judgment date as long as possible."

Other cases in support of the fact that future damages are less speculative than claimed by Defendants consider the shortness of the period of time for which damages are requested as a relevant consideration on

this point. The Trial Court quite correctly noted in its decision to allow future damages that the claim was for the short period of time of twenty-one (21) months, and, therefore, not speculative. In *Ventura*, Supra, the Court held that an employee at age fifty-six (56) computing entitlement to a pension up to age sixty-two (62) would not be speculative (a total of six (6) years). In *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, Supra, a claim for four (4) years of wages from date of discharge to date of eligibility for retirement was held not to be speculative.

Finally, *Koyen*, Supra, addressed the prerequisite of formally demanding reinstatement of the Complaint. The Court in *Koyen* stated:

> "To foreclose prospective damage awards under that concept would mean that the employee is left with no choice but to seek reinstatement, a remedy which in particular cases may be undesirable or unwanted considering both of the employee's or the employer's interest. At page 1169".

Obviously, the Trial Court realized that there existed an inappropriate circumstance for the Plaintiff to seek reinstatement as a matter of fact. It is clear from the opinion of the Lower Court that there was an atmosphere of hostility between the Defendants and the Plaintiff. (Appendix Page 20) The Court specifically found that in this case reinstatement would be an undesirable remedy. In *Blim v. Western Electric Company, Inc.* 731 F.2d 1473 (10th Cir. 1984) that Court held that the atmosphere of hostility would make an award of reinstatement inappropriate and future damages more appropriate.

Furthermore, in *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir., 1984), the court awarded front pay to an involuntarily retired attorney. In that case, the Court held that the violation of the Age Discrimination in Employment Act was not willful and that reinstatement of the employee was infeasible due to animosity. The

Second Circuit held that it was within the discretion of the Trial Court to award front pay for the full period from Trial until the Plaintiff would reach age seventy (70). The Court emphasized that this involved a relatively short time period of approximately four (4) years. *Id.* at 729. This was the case because a period of four (4) years "did not involve some of the uncertainties which might surround a front pay award to a younger worker". *Id.*

For all of the foregoing reasons, it is apparent that Plaintiff's claim for future damages was appropriate and that Plaintiff did, in fact, claim equitable relief that encompassed reinstatement; and that it was within the discretion of the Court to award front damages instead of reinstatement due to the inappropriateness of the circumstances. It is further specifically submitted that the *Koyen* and *Whittlesey* decisions are dispositive on the issue of front pay in Age Discrimination in Employment Act cases.

3. The Court below did not err in permitting Plaintiff to present evidence regarding his front pay loss without the use of expert testimony.

Defendants complained that because Plaintiff voluntarily elected to present testimony concerning future wages without the use of an expert testimony that somehow Defendants have been prejudiced. It was clearly established at the time of Trial that Plaintiff had forty (40) years of work experience and knowledge of the territory. It was also clearly established at the time of Trial that Plaintiff's earning capacity in the year 1980 was $24,000. It was also clear that Plaintiff had an intimate working knowledge of his territory at the time of his discharge and that through direct and cross-examination all witnesses, including the defendants, agreed that the sales in the Maxfield territory after his discharge increased by at least ten percent (10%) per year based on

inflation. In fact, evidence from the Defendants' correspondence indicates that Defendant expected a ten percent (10%) increase each year which was acknowledged by the Defendants' witnesses. Therefore, there is a substantial basis and sufficient evidence for the Jury to conclude that the Plaintiff's salary and commissions would also increase each year based on an inflationary factor. However, Plaintiff elected not to ask the Jury for an increased amount of money each year to avoid unnecessary mathematics for the Jury and the need for an expert witness. Rather, Plaintiff asked for the same amount of money earned in the year 1980 for each of the subsequent years that followed.The sole issue in dispute with regard to future damages are those damages from February of 1984 until November of 1985. The issue resolves around whether or not the front pay amount requested was reduced properly to present value without the use of an expert witness. Mr. Maxfield requested wages from the years 1980 through February of 1984 for back pay without any increase for inflation with the Defendants' own evidence indicated at least a ten percent (10%) per year inflationary factor for the first three (3) years. Obviously, Plaintiff's failure to use an expert witness in that area benefitted the Defendants.

In addition, Plaintiff did not ask the court to award an inflated wage figure for front wages but agreed to use the same base salary figure in 1980 and agreed to discount the present value of the front wage figure for the years 1984 and 1985. This discounting of this front wage figure to present value was calculated at the rate of ten percent (10%) discount per year. It is admitted that the figure of ten percent (10%) was chosen as an arbitrary figure. However, the mere fact that it was arbitrary does not, in and of itself, disqualify the figure as being inappropriate for a Jury to render a verdict. Defendant in no way established by any evidence or legal argument that they have in any way been prejudiced by the use of the figure of ten percent (10%). Obviously, the Court

pointed out in its reasoning for this decision that the Defendants were getting the better part of the economic bargain of such mathematical computation.

The Trial Court took judicial notice of the well-known fact and the trial court's experience that at the time of Trial experts in the field were not predicting real interest rates in excess of ten percent (10%) per year, nor had such experts done so in the past. In fact, the court stated its opinion as a judicially noticed fact that over the past ten (10) years the real interest rate had never equalled or exceeded ten percent (10%) and that had often been below zero percent (0%).

It is well recognized that the Court is entitled to take judicial notice of economic circumstances. See *Skirvin v. Mesta,* 141 F.2d 668 (Cir. Ct. App. Okl. 1944) concerning depressed economic trend between 1932 and 1940); *Anderson v. U.S.,* 179 F.2d 281, (5th Cir. 1950), Cert. Den. 70 S. Ct. 1000, 339 U.S. 965 (1950) concerning increase in market values of land within government project areas).

The fact that the Plaintiff voluntarily elected to discount to present value with a generous discount figure should not work against the Plaintiff as Defendants suggest. Logical extension of the Defendant's argument is that they would like the case reversed because Plaintiff did not choose to have an expert come in and prove that the Plaintiff deserved a much greater amount than he otherwise received. Defendants cite the case *Kolb v. Goldring, Inc.,* 649 F.2d 869 (1st Cir. 1982) for the proposition that statistical and expert evidence is necessary to prove A.D.E.A. damages. That citation of the case is absolutely inapplicable and inappropriate. *Kolb* does not state that such testimony is necessary. It states that the evidence that Kolb produced to the Jury of future raises was speculative. Kolb requested and asked the Jury to infer that he would have received an $8,000 raise based on no patterns of past increase or similar evidence. However, in the instant case, Plaintiff was specifically asked

in the damage portion of the Trial to assess his earning capacity for the years 1984 and 1985 based on his experience on his former sales territory. Plaintiff voluntarily did not add in an inflationary figure and then voluntarily discounted his future lost wages, which certainly is to the Defendants' advantage and not to the Plaintiff's.

The *Kolb* Court in setting forth the requirement for A.D.E.A. evidence held that such awards can be based where projections have been on the base of expert testimony, or patterns of past increases or similar evidence. Initially, the Plaintiff testified the patterns of past increases and, secondly, he based his projections and discounting on similar evidence. The judicially noticed fact that the discount rate of ten percent (10%) would be more than fair to the Defendants and as such is similar evidence.

As the Court noted that the termination of future damages was relatively uncomplicated and that the evidence was more than sufficient to support a Jury's relatively modest award of $7,500 for future damages for the twenty-one (21) month period of time for a Plaintiff that earned well in excess of $20,000 a year immediately preceeding his termination. Accordingly, Plaintiff respectfully submits that the Jury verdict should be left undisturbed with regard to future lost wages.

4. Plaintiff did not fail to prove a prima facie case under the Age Discrimination in Employment Act. Further, Plaintiff need not prove a prima facie case when there is direct evidence of age discrimination, as in this case.

The Appellant must establish through the record that as a matter of law Plaintiff would not have been entitled to recover because no prima facie case existed. It is respectfully submitted that the requirement that a prima facie case must be proven was a short-hand method of establishing a circumstantial case of discrimination and

nothing more. *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 253 (1981). The method of proving an Age Discrimination in Employment violation and the "prima facie" case requirement was introduced into the Trial process to facilitate the production of a circumstantial case of discrimination, especially in a situation where proof by direct evidence of discrimination is close to impossible to unearth in the world of business and corporate employment practices.

A prima facie case is merely stating to the Court that there are circumstances that point to age discrimination. This, however, does not preclude the establishment of age discrimination by direct evidence as opposed to using circumstantial evidence of illegal discrimination. If there is direct proof of age discrimination then circumstantial evidence of a discrimination or the proof of a "prima facie" case is merely cummulative.

In the instant case, the record is clear that the only issue raised by the Defendants is that Plaintiff failed to prove one (1) of the four (4) elements of a prima facie case, i.e. that his employer retains someone to continue the Plaintiff's work who is not in the protected group *Rodrigues v. Taylor,* 569 F.2d 1231 (3rd Cir. 1977). By protected group, the Defendants argue that those people protected by the statute are those who are at least forty (40) years old but less than seventy (70) years of age. There is no argument under this claim of error below that Plaintiff did not establish that he was within the protected age claim; that he was qualified for the position for which he was terminated and was performing his job at an adequate level; and that he was discharged. The only issue is whether or not Plaintiff's replacement was within the protected age group and whether or not that is a requirement for the proof of a prima facie case.

However, where direct evidence of a discriminatory intent is shown there is no need for the proof of a prima facie case. In *Spagnpolo v. Whirlpool Corporation,* 461

F.2d 1109 (4th Cir. 1981) that Court held that a substitute for proof of a prima facie case would be the proof of direct evidence of a discriminatory intent. It is abundantly clear from the evidence and the Complaint that Plaintiff alleged and proved that there was direct discrimination when Plaintiff was informed that he would be terminated based on his attaining age sixty-five (65).

If Defendant's argument were to be taken to its logical conclusion, under Title VII cases for example which used the same standard as A.D.E.A. cases, an employer could discharge a black employee based on race and even state to that employee: "I am firing you because you are black, but I am hiring another black employee to take your place". Could that employer escape the consequences of his act by merely arguing that he is replacing one (1) person of a protected group with another person from the same group.

If such a requirement were true, an employer could fire otherwise qualified but independent-minded women, blacks, older Americans, Catholics, Jews and Hispanics and replace each of those members of a particular class with more docile members of the same protected group in spite of direct proof of discrimination. Obviously, that is not the intention of either Title VII or the A.D.E.A. The intention of the Act is to prevent arbitrary age discrimination in employment, 29 U.S.C. §621 (a) and (b). Therefore, the use of the four (4) criteria to prove a prima facie case is a method of establishing age discrimination when direct proof is not present. Here, direct proof was present and the Jury determined that there was sufficient evidence to render a verdict against the Defendants.

Even assuming that the Defendants are correct that there is a need to prove a "prima facie" case in each case before submission to a Jury, the Plaintiff still has clearly established a prima facie case. Since the first three (3) elements of a prima facie case are not in dispute, it must

be assumed that Plaintiff has established all those elements. Therefore, only the fourth (4th) element as set forth in *Rodrigues v. Taylor,* Supra, is in dispute.

With regard to the necessity of proving the fourth (4th) element, the Lower Court reasoned that the purpose of this act would not be met if an employer could at any time replace an employee approaching age seventy (70) with someone just over age forty (40) and escape the consequences of the act. To allow such result would most likely facilitate more illegal activity than otherwise occurs. Defendants cite the *Rodrigues v. Taylor,* Supra, case as dispositive of the issue. However, nowhere in that opinion can the language requiring a person to be within the protected group be found. In fact, there is language just to the contrary to be found in the Eastern District of Pennsylvania District Court decision in *Berkowitz v. Allied Stores of Penn-Ohio, Inc.,* 541 F. Supp. 1209 (E.D. Pa. 1982) the Court stated the fourth (4th) criteria as: "the position was filled with a younger employee". The Court cited as its authority *Smithers v. Lailar,* 629 F.2d 892, 894-95 (3d Cir. 1980) This *Smithers,* Supra, Court used the criteria "Younger than Plaintiff". It should also be pointed out that the decisions relied upon by Defendants are at times inapposite to the particular factual situation present in this case or to the present state of the law. The *Rodrigues,* Supra, decision is a pre-*Burdine* decision and speaks of shifting burdens of proof which clearly renders this characterization of prima facie case inaplicable to the present state of the law. Also, the Defendants cite *Harping v. Continental Oil Company,* 628 F.2d 406 (5th Cir. 1980), cert. denied, 102 S. Ct. 100; *Houser v. Sears, Roebuck & Co.,* 627 F.2d 756 (5th Cir. 1980); *Mizrany v. Texas Rehabilitation Commission,* 522 F. Supp. 611 (D.C. Tex. 1981), affirmed, 685 F.2d 1385. These cases are all Fifth Circuit cases. However, Defendants fail to update this Court on the present state of the law in the Fifth Circuit. In *Elliott v. Group Medical and Surgical Services,* 714 F.2d 556

(5th Cir. 1983) the Fifth Circuit now lists, in the alternative, several options for the fourth (4th) disputed criteria to set forth a prima facie case. These options are as follows:

> "(4) the Plaintiff was replaced by someone outside a protected class; *or* (Citations omitted) (5) by someone younger, *Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974); or (6) show otherwise that his discharge was because of his age, *McCuen v. Home Insurance Company*, 633 F.2d 1150 (5th Cir. 1981)"

Therefore, the case relied upon by the Defendants in the Fifth Circuit are no longer applicable since the Circuit now recognizes both of the situations Plaintiff has argued and proved at Trial. First it recognizes that the Plaintiff was replaced by a "younger employee" and secondly, the prima facie case may be established if direct proof of age discrimination otherwise exists. See also on this point *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981) and *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

To make the argument of the Defendants even less plausible are the statements by various Circuit Courts and this Court that the four (4) criteria should not be rigidly applied. *McDonnell-Douglas v. Green*, 411 U.S. at 802, note 13; *Garner v. Borstin*, 690 F.2d 1034 (D.C. Cir. 1982); *Anderson v. Savage Laboratories, Inc.*, 675 F.2d. 1221 (11th Cir. 1982).

The fact pattern complained of in the instant case existed also in *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983) wherein a fifty-three (53) year old man was replaced by a forty (40) year old man. Obviously, the forty (40) year old man was within the protected class and the Court without directly ruling on the issue held that the fourth (4th) requirement was met when the position remained open to people with similar qualifications and in no way held, as the Defendants suggest, that

this Court should now hold. See also *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805 (D. Colo. 1983); *Jacobson v. Pitman-Moore, Inc.*, 573 F. Supp. 565 (D. Minn. 1983); *Rubis v. McGraw-Edison Company Power Systems Division*, 570 F. Supp. 27 (W.D. Pa. 1983). In all three (3) cases, the Court specifically used the word "younger employees" and not the "protected age group" language.

It is respectfully submitted that the weight of the case law is in support of Plaintiff's position as well as the weight of the rationale and the purpose of the act along with the reasoning set forth by the Trial Court in its opinion.

CONCLUSION

Respondent respectfully requests that this Petition for Certiorari be denied.

RESPECTFULLY SUBMITTED,
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